



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-171

FRANKFORD HOSPITAL, *Petitioner*

v.

BLUE CROSS OF GREATER PHILADELPHIA, *Respondent*

REPLY BRIEF OF PETITIONER

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REPLY ARGUMENT

Blue Cross' argument in opposition to Frankford Hospital's petition for a writ of certiorari is twofold: It argues that (1) its conduct does not constitute "boycott, coercion, or intimidation" under any accepted definition of those terms; and (2) the Third Circuit has never construed those terms with respect to §1013(b) of the McCarran-Ferguson Act. We take issue with each of these contentions.

First, Blue Cross' discriminatory benefit scheme plainly constitutes a boycott within the usual meaning of that term. Antitrust commentator Julian O. von Kalinowski defines boycott as "a concerted refusal to have business relations with another, a concerted inducement of third persons to do the same." 16 Business Organizations, von

Kalinowski, *Antitrust Laws and Trade Regulation* §1.03[4], at p. 1-57. In fact, the word boycott has a generally understood meaning that runs throughout the language and different fields of law. Professor Prosser defined boycott as "an organized effort to withdraw from business relations with another, or to induce third persons to do the same." Prosser, *Law of Torts* at 986 (3d ed. 1964). Moreover, it is equally accepted that peacefully persuading or inducing persons not to do business with others is as much a boycott as is forcible restraint. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 467-68 (1921); *Vandervelde v. Put and Call Brokers and Dealers Assn.*, 344 F.Supp. 118, 141 (S.D.N.Y. 1972), opinion supplemented, 344 F.Supp. 157 (S.D.N.Y. 1972).

As stated in the original Petition, Blue Cross has created a discriminatory benefit scheme that drives Blue Cross subscribers away from non-member hospitals. A Blue Cross subscriber is faced with a dramatic choice. He or she is entitled to receive care at a member hospital without further charge (except for minor exceptions); but a subscriber who selects a non-member hospital will, in most cases, be reimbursed for only a small fraction of the hospital bill and will be personally obliged for the balance, often running to many thousands of dollars. The idemnity benefits given for care at non-member hospitals are unrelated to either hospital costs or charges, and are visibly set for the specific purpose of inducing subscribers to attend only Blue Cross member hospitals. Therefore, the discriminatory benefit scheme clearly is a boycott within the common meaning of that word.

Second, the Third Circuit implicitly construed §1013(b) of the McCarran-Ferguson Act when it issued its opinion of May 2, 1977 in the instant case. Because the discriminatory benefit scheme clearly constitutes a boycott within the usual meaning of that term, the Third Circuit has tacitly applied a narrower definition in reaching

the conclusion that there was no boycott present (A.21.)* Also, the Third Circuit's three-paragraph opinion in effect adopts the lengthy district court opinion which does construe §1013(b) and states that the terms "boycott," "coercion," and "intimidation" are to be defined narrowly. (A.11-12) It is significant that both defendant and the district court relied upon the Fifth and Ninth Circuit opinions construing the McCarran-Ferguson Act. Although the district court may not in all respects agree with the view adopted by the Fifth and Ninth Circuits (see A.12, n. 14), it differs widely with the First, Second, Fourth, and District of Columbia Circuits which hold that the terms are to be given their usual meanings.

For the foregoing reasons, we respectfully request that our petition be granted.

Respectfully submitted,

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* In addition to the boycott, Frankford argues that Blue Cross has used other tools to coerce hospitals into membership, particularly its refusal to honor assignments of benefits. (Petition, p. 7)

CERTIFICATE OF SERVICE

I certify that the foregoing Reply Brief of Petitioner was served upon all interested parties on September 13, 1977, by depositing three copies in a United States mail box, with first class postage prepaid, addressed as follows:

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A handwritten signature in cursive script, appearing to read "John P. Quinn", is written over a horizontal line.

John P. Quinn